Office-Supreme Court, U.S.
FILED
MAR 17 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~988~~ 981

SIDNEY FELBER,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

PAGE

Statement 1

Opinions Below 2

The Questions Involved 3

Constitution and Statutes 3

The Facts 4

POINT I:

The petition for certiorari fails to set forth any meritorious claim of violation of constitutional rights; accordingly certiorari should be denied 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Fox Film Corp. v. Muller, 296 U. S. 207 (1935) 14

Harris v. United States, 382 U. S. 162 (1965) 10, 11

Kent v. United States, 383 U. S. 541 (1966) 10, 11

Konigsberg v. The State Bar of California, 353 U. S. 252, reh. den. 354 U. S. 927 (1957) 10, 11

Wall, Ex Parte, 107 U. S. 265 11

PAGE

Constitution:

Constitution of the United States

Fourteenth Amendment 3

Statutes:

New York Judiciary Law

Section 90, Subdivision 4 ..... 4, 5, 9

Section 90, Subdivision 5 12

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BRIEF FOR RESPONDENT

Statement

This petition for a writ of certiorari to the Appellate Division of the New York Supreme Court, First Judicial Department, seeks review of an order of that Court, entered February 3, 1966, denying petitioner's motion for an order reinstating him as an attorney and counselor-at-law in the State of New York. Petitioner was disbarred by the Appellate Division on October 31, 1941.

On May 5, 1966, the New York Court of Appeals dismissed petitioner's appeal to that Court as of right on the ground

that the order denying reinstatement did not finally determine the proceeding within the meaning of the New York Constitution.

Petitioner's motion addressed to the Appellate Division for leave to appeal to the Court of Appeals from the order of February 3, 1966, was denied on July 7, 1966. The Appellate Division, in addition to denying leave to appeal, denied petitioners' application for an order amending the February 3, 1966, order to provide "that petitioner's claimed violation of his rights pursuant to the Fourteenth Amendment of the Constitution of the United States were presented and necessarily passed upon . . ."

On October 20, 1966, the New York Court of Appeals dismissed petitioner's motion for leave to appeal to that Court on the ground that the order appealed from did not finally determine the proceeding within the meaning of the State Constitution.

Opinions Below

The decision of the Appellate Division denying, without opinion, petitioner's motion for reinstatement is reported at 25 App. Div. 2d 509. The memorandum decision of the Court of Appeals dismissing petitioner's appeal is reported at 17 N. Y. 2d 806.

The decision of the Appellate Division denying petitioner's application for leave to appeal has not yet been officially reported.

The memorandum decision of the Court of Appeals dismissing petitioner's motion for leave to appeal to that Court is reported at 18 N. Y. 2d 800.

The Questions Involved

1. Where an attorney is automatically disbarred upon his conviction of a felony and that conviction is reversed and the indictment thereunder thereafter dismissed by the trial court, did New York deny him due process of law by refusing to reinstate him when, upon a hearing on his motion for reinstatement, professional misconduct on his part was established by respondent?

2. Should petitioner have review in this Court of a twenty-six year old order of disbarment when he failed to raise questions now urged by him at the time of the original proceedings?

3. In view of petitioner's failure to urge the questions now contended for by him during the original proceedings twenty-six years ago and in light of the Appellate Division's refusal to amend the order denying reinstatement—review of which is here sought—to state that constitutional questions were presented and necessarily passed upon, does the order rest upon adequate and independent non-federal grounds, thereby precluding this Court from reviewing that order?

Constitution and Statutes

Constitution of the United States
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judiciary Law of the State of New York

Section 90. Admission to and removal from practice by appellate division.

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

The Facts

On June 17, 1941, the petitioner was convicted, after a trial by jury, of the crimes of grand larceny in the first degree and forgery in the third degree. On October 31, 1941, pursuant to the provisions of Subdivision 4 of Section 90 of the New York Judiciary Law, petitioner was disbarred by order of the Appellate Division on the basis of his convic-

tion of a felony. Subdivision 4 of Section 90 reads as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such."

On May 8, 1942, the Appellate Division reversed petitioner's conviction and ordered a new trial [*People* v. *Felber,* 264 App. Div. 181 (1st Dept. 1942)] because of erroneous instructions given by the trial judge to the jury. Thereafter, on September 1, 1942, the District Attorney of New York consented to a reversal of the indictment upon which the conviction had been based.

The petitioner then moved for reinstatement. The Appellate Division appointed an Official Referee to take testimony relative to the application and to report to the Court thereon. Hearings were held by the referee on May 6, 12, June 24 and November 1, 1943, at the conclusion of which, he filed his report, dated February 16, 1944.

The referee, in his report noted that petitioner, *inter alia,* contended

> "Secondly, that those acts and the issues involved growing out of that relationship have been decided by a criminal court in favor of the applicant. That there is no authority for withholding his reinstatement when the order disbarring him was based upon a certificate showing he had been convicted of a felony not arising out of or involving any act as an attorney at law, which conviction was later reversed and the indictment dis-

missed, thus finally acquitting him of criminal responsibility. That having thus been finally acquitted and being innocent of crime he questions the power of the court to reexamine and consider evidence which was declared to be insufficient to convict of a crime and which does not involve the applicant in any misconduct in his practice as an attorney at law."

The referee then analyzed these contentions and, upon the basis of New York law, rejected them. The referee thereupon stated:

"Regardless of whether the applicant was indicted or convicted or acquitted of a crime, the question that is presented for decision in this proceeding is: Has the Bar Association in opposition to the applicant's request for reinstatement, established, as it claims, that in the practice of his profession as an accountant he has been guilty of an act which shows that he does not possess the qualifications of honesty and integrity required of a member of the Legal profession and, therefore, he should not be reinstated?"

After a painstaking analysis of the evidence presented at the hearings, the referee concluded

"In my opinion it has been established that in the years 1936, 1937 and 1938, for the purpose of enabling the Mab Motors, Inc., a corporation by whom he was employed as an accountant, to defraud the City out of sums due for sales taxes, the applicant gave instructions to enter, as loans payable and loans receivable in the books of the corporation used by it in its main place of business in the Borough of the Bronx, the

amounts of taxes collected from purchasers at the branch place of business of the corporation in the Borough of Manhattan, checks for which amounts of sales taxes were transmitted by the Manhattan branch of the corporation to the main office of the corporation in the Borough of the Bronx; and that he also instructed his assistants that in making up tax reports required by the City to be filed quarter yearly, to conceal the fact in such reports that any amount was due for sales tax on purchases made in the Manhattan branch, and in making up such reports to state that the total amount of sales made by the corporation in all its branches in each quarter year was only the amount of sales made by the corporation at its principal place of business, its Bronx branch. That the instructions so given by the applicant were carried out and the false entries made in loans payable and loans receivable as directed by the applicant, and the tax reports also made and filed with the City for each of the quarter years commencing with the quarter year ending October 1, 1936 and up to the quarter year ending October 1, 1938, as directed by the applicant. That as a result of such fraud it was discovered by a city auditor who made an investigation of the books of the corporation in June, 1939, that the officers of the corporation had embezzled upwards of Twenty-three thousand dollars of sales taxes that should have been paid to the City during the periods above mentioned."

The Appellate Division confirmed the referee's report (268 App. Div. 156) stating:

> "The record before this court not only sustains the findings of the Official Referee, but it clearly demonstrates that the petitioner is unfit for membership in the legal profession."

Since the Appellate Division's denial of the aforementioned petition for reinstatement, petitioner has unsuccessfully made four additional motions for reinstatement—the denial of the last of which is the subject of the present petition for certiorari.

In the present motion for reinstatement, petitioner urged that his reinstatement was justified because

> "1. Violation of the Fourteenth Amendment in the failure to have my right to practice law restored upon reversal by this Court of the felony conviction which had automatically caused disbarment. Also, violation of the Fourteenth Amendment in the forfeiting of my right to have discipline administered on all the circumstances.
>
> 2. Violation of the Fourteenth Amendment in subjecting me to a second trial when on the same facts not involving legal practice, I had been judicially absolved by judgment of General Sessions.
>
> 3. Discriminatory discipline inflicted on me—even on the erroneous assumption of guilt—constituting a violation of the Fourteenth Amendment."

The denial of this latest application and the subsequent appellate proceedings in the New York Courts have already been described (*supra*, pp. 1-2).

POINT I

The petition for certiorari fails to set forth any meritorious claim of violation of constitutional rights; accordingly certiorari should be denied.

Approximately twenty-five years ago, petitioner was disbarred following his conviction for a felony, pursuant to the provisions of Subdivision 4 of the New York Judiciary Law. After the reversal of his conviction and the subsequent dismissal of the indictment by the trial court, petitioner moved for reinstatement. The Appellate Division appointed an Official Referee to hear and report. The Referee took testimony at hearings, during which petitioner was represented by counsel, and, at the conclusion, reported to the Appellate Division that the objections filed by respondent had been sustained by the evidence. The Appellate Division confirmed the Referee's report and denied the motion for reinstatement.

The record thus demonstrates that petitioner's continued disbarment after reversal of his conviction rested not on arbitrary action of the State of New York as petitioner now contends but rather upon evidence of misconduct presented to and passed upon by the Appellate Division (*cf.*, Petition, pp. 16-18).

At the hearings before the Referee, it is clear that respondent had the burden of establishing petitioner's misconduct and that the Referee and the Appellate Division found that the burden had been met. In short, although petitioner was not automatically reinstated upon reversal of his conviction, his continued disbarment rests on affirmative evidence of misconduct presented at the hearing on his first motion for reinstatement.

It is equally clear that petitioner's contention that he was deprived of his presumption of innocence in the reinstatement proceeding lacks merit (Petition, pp. 19-20). This is so in view of the Referee's specific recognition that the issue was whether respondent had sustained its objections to petitioner's reinstatement and his findings that its objections had been sustained by the evidence presented.

Significantly, petitioner urges that, upon the reversal of his conviction, he should have been relieved of the disbarment " . . . subject to any disciplinary proceedings which the Association of the Bar might have seen fit to bring based on the facts which had given rise to the conviction. In the latter event, petitioner would have stood before the law as any attorney, accused *de novo,* of wrongdoing" (Petition, p. 18). This contention might have some merit had petitioner been required to bear the burden of proving his innocence of charges of professional misconduct but, as demonstrated, upon the hearing of the motion for reinstatement it was the respondent, not the petitioner, which had the burden of proof on that issue.

In this connection, petitioner contends that, in disciplinary proceedings, the State should be required to prove guilt therein by a higher standard of proof than by a preponderance of the evidence. (Petition, pp. 20-21) In so urging the point, he cites three cases decided by this Court: *Harris* v. *United States,* 382 U. S. 162 (1965); *Kent* v. *United States,* 383 U. S. 541 (1966); *Konigsberg* v. *The State Bar of California,* 353 U. S. 252, *reh. den.* 354 U. S. 927 (1957).

These cases, it is submitted, do not support petitioner's argument concerning the burden of proof in disciplinary

proceedings which are civil in nature rather than criminal, *Ex Parte Wall*, 107 U. S. 265, 288. In *Harris*, the Court reversed an order of a Federal District Judge holding a grand jury witness in summary contempt for refusal to answer questions before a grand jury on the ground that the contempt, if any, was before the grand jury and not the Court. In *Kent*, this Court held, on the facts of that case, that a Juvenile Court's waiver of jurisdiction over the youth there involved and remitting him for trial in the United States District Court where he was subsequently indicted violated principles of due process. The Court reached this conclusion because of the Juvenile Court's failure to accord the youth a hearing and failure to allow counsel access to that Court's records concerning the case.

In the third case cited by petitioner, *Konigsberg*, there was involved an order of the Supreme Court of California which had refused a candidate admission to the state bar on the ground that he had failed to establish his good moral character and to prove that he did not advocate overthrow of the federal and state governments by unconstitutional means. This Court reversed and held that the applicant's due process rights had been violated because his membership in the Communist Party in 1941, his criticism of public officials and his refusal to answer questions concerning his political opinions could not rationally support a conclusion of bad character.

The petitioner further contends that the procedure by which he was disbarred denied him equal protection of the laws in three respects (Petition, pp. 21-23). His claims lack merit.

The first contention, in this regard, is that, because of his automatic disbarment, the Appellate Division, upon confirming the referee's report in the reinstatement proceeding, had no discretion to impose a discipline less than disbarment (Petition, p. 21). This proposition, however, has no support in New York law. Subdivision 5 of Section 90 of the New York Judiciary Law grants to the Appellate Division the power in cases where the felony conviction is reversed to ". . . . vacate or modify such order or debarment [sic]". Under this statutory provision, in the case at bar, the Appellate Division could have imposed a less severe discipline than it did but, from what has been already said, it exercised its discretion against lessening the discipline predicated on the evidence of misconduct presented to its Referee at the hearing on the application for reinstatement.

Petitioner argues that New York's automatically disbarring attorneys upon a felony conviction and refusing automatic reinstatement upon reversal of the conviction but not doing so where members of other professions, e.g. medicine, are similarly circumstanced violates the equal protection of the laws provision of the Federal Constitution (Petition, p. 23). Although it is true as petitioner claims that there is here a differentiation in treatment, there is a reasonable basis therefor. A lawyer is an officer of the court, and, as such, is intimately involved in the administration of not only civil justice but of criminal justice as well. It is thus perfectly understandable and rational that an officer of the court upon being convicted of a grave violation of the state's criminal law—a felony—should be prevented from further participation as a minister of the laws of which he has been convicted of transgressing and that, in

cases where the conviction has been reversed, the courts should have the opportunity to determine all the facts before reinstatement. On the other hand, these reasons do not apply to the other professions such as medicine.

Lastly, petitioner claims New York's affording the right to apply for leave to appeal to the New York Court of Appeals from an order of disbarment but denying such right where an order denying reinstatement is involved is violative of equal protection (Petition, pp. 21-2).

This argument is likewise without merit. Petitioner, certainly, could have appealed to the New York Court of Appeals as of right from the order of disbarment, upon a claim of a constitutional question or, at the very least, have applied for leave to appeal to that Court from that order. At that time, he could have urged his claims vis-a-vis the unconstitutionality of the automatic disbarment provision of the New York Judiciary Law. In addition, he could have raised but did not do so, the questions he now raises, upon his first motion for reinstatement and if rejected by the Appellate Division, and upon dismissal by the New York Court of Appeals of his application for leave to appeal, could have sought review by this Court of the questions he now asserts. In short, viewed realistically, petitioner seeks review by this Court of judicial determinations made approximately twenty-six years ago. The time for review of the questions he now raises was then and not now.

In this connection, although the Appellate Division in denying the instant motion for reinstatement, wrote no opinion, it nevertheless later denied a motion by petitioner to amend its order so as to state that constitutional questions were presented and necessarily passed upon in its

denial of reinstatement. The import of the Appellate Division's refusal to amend the order in question is that it denied petitioner's motion for reinstatement on the ground that the claims now urged by him were untimely raised since they could have been—but were not—urged in the proceedings twenty-six years ago. The order of the Appellate Division, it is submitted thereby rests on an adequate and independent non-federal ground and is, therefore, not reviewable by this Court [See *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935)].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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